IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.2974 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : Yes : YES

2. To be referred to the Reporter or not? : Yes : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : No : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : No : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals?: No : NO

ADAMBHAI SULEMANBHAI DESAI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2974 of 1996

MR JM PATEL FOR MR PJ VYAS for Petitioner No. 1

MR HD DAVE, AGP. for Respondent No. 1

MR NAGIN N GANDHI for Respondent No. 2-4

..... for Respondent No. 5-8

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 26/06/2003

ORAL JUDGEMENT

1 This is a petition under Article 226 of the Constitution of India challenging the order dated 26/6/1992 passed by the Gujarat Revenue Tribunal in

Revision Application No.TEN.BA. 127/88 & TEN BA.137/88 as well as order dated 17/4/1995 in Review Application No.TEN CA.42/92 and TEN CA.43/92 passed by the Gujarat Revenue Tribunal (for short 'the Tribunal')

2 The petitioner is Chairman of one Desai Cooperative Housing Society Limited and has preferred the petition for and on behalf of the petitioner society registered under the Gujarat Cooperative Societies Act. The dispute relates to land bearing survey no.205 admeasuring 4 Acres 31 Gunthas situated in the sim of Dhandhuka town. The said lands were originally of the ownership of a public trust named 'SARVARSHA PIR'. One Musabhai Yakubbhai (since deceased), was the tenant and was cultivating the aforesaid land owned by the trust. Upon death of said Musabhai Yakubbhai the names of his heirs viz. respondent nos. 2 to 5 came to be entered in the revenue records as tenants. Respondent No.5 is the mother of respondent nos. 2, 3 and 4. Respondent nos. 6, 7 and 8 are the Vahivatdars i.e. Administrators/Trustees of the aforesaid trust. The lands were Devsthan Inams and, hence, upon the Devsthan Inams Abolition Act coming into force with effect from 15.11.1969, respondent no.5 became deemed purchaser of the said land in light of provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 (the Act).

3 Accordingly, the Mamlatdar & ALT initiated proceedings under Section 32G of the Act bearing Tenancy Case No. 5/71. After recording the statements of respondent no.5 as well as one of the trustees of the trust, viz. the land owner, declared respondent no.5 as permanent tenant and also determined the purchase price which was mutually agreed upon by the parties during the course of proceedings of Tenancy Case No.5/71. The Mamlatdar & ALT directed the revenue authority to delete the name of the land owners, i.e. the trust and enter the names of respondent nos. 2 to 5 in the revenue records.

4 On 24/11/1971 respondent no.5 entered into a sale transaction with the petitioner and the petitioner society purchased the land for a consideration of Rs.21,000/-. Thereafter, the petitioner applied for conversion of the said land into non-agricultural land on 6/9/1975 and the District Development Officer, District Panchayat, Ahmedabad vide his order dated 29/11/1995 granted permission to convert the said land and use the same for building purpose as per the plan produced before him subject to various conditions imposed in the order dated 29.11.1975.

5 Respondent Nos. 2 to 4 filed Civil Suit No.265/85 in the Civil Court, Narol on 30/11/1985 seeking partition of the suit land. An ex-parte injunction was obtained against the petitioner society not to plot out the land and put-up construction. However, the Civil Court, Narol after hearing the parties to the suit vacated ad-interim stay granted earlier.

6 Thereafter, on 15/4/1987 respondent nos. 2 to 4 filed an appeal under Section 74 of the Act before the Deputy Collector against the order of Mamlatdar & ALT dated 22/6/1971 and the said appeal came to be registered as Appeal No. 104/87. The Deputy Collector, vide order dated 30/12/1987 allowed the appeal and directed the Mamlatdar & ALT to issue notice to all the interested persons and dispose of the case in accordance with law.

7 Being aggrieved by the said order dated 30/12/1987 the petitioner filed Revision Application No.TEN.BA 137/88 under Section 76 of the Act before the Gujarat Revenue Tribunal. The respondent no.8 - Trust also filed a separate Revision Application bearing TEN.BA 127/88 before the Tribunal. As the subject matter of both the Revision Applications was same and the parties were also the same, the Tribunal consolidated both the Revision Applications and passed a common order dated 26/6/1992 confirming the order made by the Deputy Collector. The petitioner society thereafter preferred Review Application bearing Review Application No.TEN.BA 42/92 and the Trust preferred Review Application bearing No.TEN BA 43/92. However, for the reasons stated in its consolidated order dated 17/4/1995 both the Review Applications were rejected by the Tribunal.

8 Heard Mr.J.M.Patel, learned Advocate appearing for Mr.P.J.Vyas on behalf of the petitioner society. It is contended by him that both the Deputy Collector and the Tribunal have grievously erred in law in holding that the order dated 22/6/1971 passed by the Mamlatdar & ALT in Tenancy Case No.5/71 was a nullity. It was submitted that the appellate authority has failed to take into consideration, firstly, that the appeal was hopelessly barred by limitation, the same having been filed after about 16 years from the date of the order of the Mamlatdar & ALT; secondly, that respondent nos. 2, 3 and 4 who were appellants before the Deputy Collector and the Tribunal could not be said to be aggrieved parties and thus becoming entitled to the statutory right of Appeal and; thirdly, that once the land in question had been converted into non-agricultural land vide order dated

29.11.1975 made by the competent authority, the provisions of the Act ceased to apply divesting the Deputy Collector of any jurisdiction to act under the provisions of the Act. It was submitted in support of the first proposition : that respondent nos. 2, 3 and 4 had contended before the Appellate Authorities that they were not parties to the proceedings before the Mamlatdar & ALT and, hence, on the one hand the aspect of limitation would not come in way of respondent nos. 2, 3 and 4 while filing the appeal and, secondly, that as they had not been joined as parties by Mamlatdar & ALT, the order was null and void in law and all consequential actions should fail : to this Mr.patel replied that the deposition given by respondent no.5 viz. Gauriben, the mother of respondent nos. 2, 3 & 4 had been signed by two sons and though this fact was on record both the appellate authorities had failed to consider the same, there being no discussion or finding on the said aspect of the matter. It was further submitted that the position in law was well settled that even if null and void order was to be challenged such a challenge had to be raised within the prescribed period of limitation, or at least within a reasonable period after the expiry of period of limitation. That till such a challenge was not raised the said order was effective for all intents and purposes. In the present case, third party rights had intervened, by the time the appeal came to be filed in 1987 and once the land had been sold by a valid sale deed the same was not open to challenge. In support of the aforesaid contention reliance was placed on the decision of the Apex Court in the case of State of Punjab and others Vs. Gurdev Singh reported in AIR 1992 SC 111.

8.1 Mr.Patel further submitted that the order passed by the Mamlatdar & ALT on 22/6/1971 declaring the respondent to be a permanent tenant of the land was in favour of the respondents and respondent nos. 2, 3 & 4 cannot claim to be aggrieved parties which would grant them right to prefer an appeal. For this purpose attention was invited to the provisions of Section 32G of the Act read with Section 32H as well as Section 43 of the Act and it was contended that the order in Tenancy Case No. 5/71 granted benefit to the respondents as the respondents were declared to be permanent tenants and in no circumstances could the respondents state that any adverse order had been made which would prejudice their interest.

8.2 In relation to the third contention regarding conversion of the land from agricultural to non-agricultural, it was submitted that the position in

law was well settled. That once an order was made by the competent authority granting permission for such conversion the provisions of the Act cannot be taken recourse to. Reliance was placed in support of this proposition on the decisions of this Court in the case of Mali Amrutlal Becharbhai and others Vs. The District Collector of Banaskantha and others, AIR 1994 (Guj.) 36 and in the case of M/s.Jailaxmi Estate and Another Vs. State of Gujarat and others, AIR 1994 (Guj.) 38.

9 As against this Mr.N.G.Gandhi, learned Advocate appearing on behalf of respondent nos. 2 to 4 submitted that all the points raised by the petitioner had been dealt with by the Tribunal and there being no error apparent on the face of the record it would not be permissible to this Court to go into the merits of the controversy under Article 227 of the Constitution of India. It was submitted that though the petition was stated to be filed under Article 226 of the Constitution of India in effect it was a petition under Article 227 of the Constitution of India and position in law was well settled that the scope of jurisdiction under the said Article was well prescribed. In support of the proposition that there was no error apparent on record, order of the Tribunal in Review Application was read extensively. It was further contended that the appellate authority had rightly held that the order passed by the Mamlatdar & ALT was null and void and no prejudice was caused to the petitioner as the entire proceedings were open before the Mamlatdar & ALT in light of the order made by the Deputy Collector.

10 Mr.H.D.Dave, learned Assistant Government Pleader appearing on behalf of respondent No.1 submitted that the State Government had nothing to state either for or against the petition in light of the fact that the dispute was primarily a dispute between two private parties and no relief was sought in any manner against the State.

11 In rejoinder Mr.Patel repelled the contention raised by Mr.Gandhi that there was no error apparent on record by referring and relying upon the decision in the case of Gopala Ganu Wagale Vs. Shri Nageshwardeo Patas, AIR 1978 SC 347. It was submitted that even if the petition was treated to be a petition under Article 227 of the Constitution the Apex Court had in no uncertain terms laid down in the aforesaid decision that whenever the revenue authorities had committed a manifest error the High Court would be justified in interfering with the findings recorded by the revenue authorities.

12 The contention regarding limitation as well as the order of the Mamlatdar & ALT being nullity are interlinked and are required to be dealt with together. The golden thread running through the orders of the appellate authorities and the order in review application are primarily based on the finding that the order dated 22/6/1971 was a nullity. Both the Deputy Collector as well as the Tribunal have held that once the order under challenge was a nullity the law of limitation would not apply and it was in that context that the Deputy Collector after setting aside the order dated 22/6/1971 passed by Mamlatdar & ALT, restored the matter to the file of Mamlatdar & ALT. On going through the appellate orders of the Deputy Collector and the Tribunal, it is apparent that both the authorities have proceeded on the footing that the Mamlatdar & ALT had not issued necessary notice as required under Section 32G of the Act to the interested persons.

13 Section 32G of the Act stipulates that the Mamlatdar & ALT shall publish or cause to be published a public notice in the prescribed form calling upon all the tenants (deemed purchasers), all landlords and all other interested persons. Over and above this public notice, the Tribunal is also required to issue an individual notice to each such tenant, landlord and also, as far as practicable, (Emphasis supplied) other persons. Both the public notice and the individual notices are required to specify the date on which the said parties shall appear before the Mamlatdar & ALT. Sub-section (2) of Section 32G of the Act lays down the mode and manner in which the statement of the tenant is to be recorded by Mamlatdar & ALT regarding willingness or otherwise to purchase the land. Sub-section (4) of Section 32G of the Act directs that the Mamlatdar & ALT shall after hearing all the persons, more particularly described in sub-section (1) of the said Section and after holding inquiry determine the purchase price in accordance with the provisions of Section 32H and sub-section (3) of Section 63A of the Act. However, under the Proviso to sub-section (4) it is open to the landlord and the tenant to mutually agree upon the purchase price and the Mamlatdar & ALT is thereafter required to satisfy itself that the tenant's consent to the agreement is voluntary and that the purchase price is fixed in accordance with the provisions of Section 32H of the Act. If this Scheme laid down in Section 32G of the Act is borne in mind and applied to the facts of the case it becomes abundantly clear that the Mamlatdar & ALT while passing the order dated 22/6/1971 had not only complied with the statutory

requirement but also has taken care to see that the interest of all concerned is taken care of. During the course of hearing the statement of respondent no.5 viz. Gauriben has been placed on record and it goes to show that after recording the deposition and obtaining thumb impression of respondent no.5, respondent nos. 2 and 3 have signed below the said deposition. This goes to show and suggest that not only the respondent no.5 but even respondent nos. 2, 3 and 4 were aware of the date fixed by the Mamlatdar & ALT for hearing of the tenancy case and accordingly were present before the Mamlatdar & ALT. It is not the case of the said respondents viz. respondent nos. 2, 3 and 4 that they were not present at the time of hearing and that their signatures have been either obtained subsequently or that they have not appended their signatures. If this be the position, it is not possible to agree with the reasoning of the appellate authorities viz. Deputy Collector and the Tribunal that all interested persons were not issued necessary notice. Even otherwise on a plain reading of provisions of Section 32G(1) of the Act, it is apparent that the individual notice to each such tenant, landlord, and also, as far as practicable, other persons, is required to be issued by the Mamlatdar & ALT. If the reasoning of the Deputy Collector and the Tribunal is correct then phrase 'as far as practicable' in sub-section (1) of Section 32G of the Act becomes redundant and otiose. The statute does not mandate the service of individual notice to other persons once the public notice is issued. The phrase "as far as practicable" is preceded by a comma, which in turn is preceded by the words "and also". Hence, the position of the aforesaid words punctuated by a comma definitely indicates the legislative intent of an individual notice being mandatory so far as a landlord or a tenant is concerned; but such an individual notice in relation to other persons (not being the landlord or the tenant) may be served if it is possible to do so. There is no compulsion. The reason is : the ALT may not be in a position to have knowledge about such other persons, if any. On the other hand, the opening portion of sub-section (1) of Section 32G of the Act mandates publication of a public notice, only to take care of such unknown other persons, if any.

14 It is in this context that one will have to appreciate the findings of the appellate authorities when they go on to record that no public notice was issued. The memorandum of appeal and the grounds raised by respondent nos. 2, 3 and 4 before the Deputy Collector do not state that any public notice was not issued. The

entire memorandum of appeal only goes on the footing that the individual notice to interested persons, more particularly, heirs of the deceased Musabhai Yakubbhai had not been issued. As already seen from the facts hereinbefore, it is apparent that two of the respondents out of the three contesting respondents were present before the Mamlatdar & ALT. If this be the position it is not possible to agree with the findings and conclusion of the appellate authorities that interested persons were not served with notice and hence entitling them to challenge the order as a nullity.

15 Even if it is assumed that no public notice or individual notices were served, would it make the order dated 22.6.1971 made by the Mamlatdar and ALT a nullity ? Considering the fact that two out of three respondents participated in the proceedings, the answer would be No. In almost similar situation (though under a different statute) this Court has stated thus in the case of Commissioner of Income-Tax, Gujarat-I Vs. Sumantbhai C.Munshaw, 128 ITR 154.

"Now, the rights and liabilities which a dead man leaves behind him ordinarily pass on to some person whom the dead man, or the law on his behalf, has appointed to represent him in the world of the living. Such representative bears the persona of the deceased and has vested in him all the inheritable rights and has imposed upon him all the inheritable liabilities of the deceased. He is in some sort identified by the law with him he represents. The legal personality of the dead man thus survives his natural personality, until his obligations being duly performed, his representation among the living is no longer called for (See Salmond on Jurisprudence, 12th Edn., p. 443)"

Thereafter, the Court while analysing Section 159 of the Income Tax Act,1961 states thus :

The basic scheme underlying this provision, which extends the legal personality of a deceased person for the purpose of assessment of tax, proceed on a recognition of the audi alteram partem rule which mandates that no man shall be condemned unheard. Therefore, although the natural personality of the deceased person has disappeared, the legal representative, who represents him in the world of living, is treated as the assessee and he is afforded a full

opportunity of being heard before an assessment is made which is binding on the estate.

The foregoing discussion shows that s.159, which merely prescribes the method for making assessment of tax in a special case, does not bear upon the initial jurisdiction of the taxing authority but deals with matters incidental to it. If the assessing authority, in the exercise of his jurisdiction, omits to take one or more of the various procedural steps therein laid down or in taking any of such steps commits an error or even deviates from the statutory mandate, the assessment would be null and void, only if the omission, error or breach, as the case may be, is so fundamental as could not be waived because it affects inherent jurisdiction. The legal representative has a right to waive the advantage of any of the statutory provisions made solely for his protection or benefit and not conceived in public interest. Therefore, if the legal representative (which term includes plurality of persons) is present before the taxing authority in some capacity or voluntarily appears in the proceeding without service of notice or upon service of notice not addressed to him but to the deceased assessee, and does not object to the continuance of the proceeding against the deceased person and is heard by the ITO, in regard to the tax liability of the deceased and invites an assessment on merits, such a legal representative must be taken to have exercised the option of abandoning the technical plea that the proceeding has not been continued against him, although, in substance and reality, it has been so continued. If and when an assessment order is consequently made in such a proceeding in the name of the deceased assessee, even that would not be a nullity qua the legal representative, not only because he was afforded a full opportunity of being heard in respect of it but also because he having not raised an objection at the appropriate time with regard to the continuance of the assessment proceeding against the deceased person, he must be taken to have known the inevitable outcome of the assessment being made in the name of the deceased and to have opted to treat such an assessment as having been made as the legal representative against him and to waive any objection as to its nullity on the said ground. Such an exercise of

option on his part is not against public policy or public morality because the waiver is of a statutory provision which is conceived not in public interest but in the interest of the legal representative. It is obvious, therefore, that under such circumstances, the contravention of the relevant statutory provision would be a mere irregularity may be a gross irregularity, but not a nullity".

16 Hence, having participated in the proceedings before the Mamlatdar and ALT it does not lie in the mouth of Respondents 2, 3 & 4 to say that the order dated 22.6.1971 is a nullity. To the contrary, there is a strong presumption that procedural requirement was waived by them. Even if there was a procedural lapse it amounted only to an irregularity and not a nullity.

17 However, even assuming that for the reasons stated in the orders of the Deputy Collector and the Tribunal the order dated 22/6/1971 could be treated as nullity yet unless and until the same is challenged within the prescribed period of limitation or in a reasonable period beyond the period of limitation and declared to be a nullity by a competent Court it would remain effective. In the case of State of Punjab Vs. Gurudevsingh (supra), the Apex Court took up the hearing of two Civil Appeals together. In one case the suit for declaration of the order of termination was instituted after a period of seven years and in another case the suit had been instituted after nearly six years. In both the cases Punjab and Haryana High Court had held that, a suit for declaration that the order of dismissal was void, could not be stated to be barred by limitation. It was against the said decision that State of Punjab had preferred appeal before the Apex Court. In para 4 of the judgment the Apex Court has discussed the Scheme of the Limitation Act and held that :

"The words 'right to sue' ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted (See :(i) Mt.Bolo v.Mt.Koklan, AIR 1930 PC 270 and (ii) Gannon Dunkerley and Co. v. Union of India, AIR 1970

SC 1433)."

The Supreme Court thereafter goes on to lay down that even if the respondents before it had been dismissed from service illegally yet to challenge the same they had to approach the Court within the prescribed period of limitation. As to what is the effect of an order which is void or nullity, it has been laid down thus :

"xxx xxx xxx For the purpose of these cases, we may assume that the order of dismissal was void, inoperative and ultravires, and not voidable. If an Act is void or ultra vires it is enough for the Court to declare it so and it collapses automatically. It need not be set aside. The aggrieved party can simply seek a declaration that it is void and not binding upon him. A declaration merely declared the existing state of affairs and does not 'quash' so as to produce a new state of affairs.

But nonetheless the impugned dismissal order has at least a de facto operation unless and until it is declared to be void or nullity by a competent body or Court. In Smith V. East Elloe Rural District Council, 1956 AC 736 at p.769 Lord Radcliffe observed :

'An order even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders'.

7. Apropos to this principle Prof. Wade states; the principle must be equally true even where the 'brand' of invalidity is plainly visible for their also the order can effectively be resisted in law only by obtaining the decision of the Court (See : Administrative Law 6th Ed.p.352). Prof.Wade sums up these principles :

'The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may

refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another'. (Ibid p.352).

8. It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the prescribed period of limitation. If the statutory time limit expires the Court cannot give the declaration sought for".

18 In two subsequent decisions the Apex Court has stated the law thus : In the case of State of Kerala Vs. M.K.Kunthikannan Nambiar, (1996) 1 SCC 435:

" 8.In Halsbury's Laws of England, 4th Edn., (Re-issue) Vol.1(1) in para 26, p.31, it is stated thus :

' If an act or decision, or an order or other instrument is invalid, it should, in principle, be null and void for all purposes; and it has been said that there are no degrees of nullity. Even though such an act is wrong and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is preserved'.

In the Judicial Review of Administrative Action, De Smith, Woolf and Jowell, 1995 Edn. at pp.259-60 the law is stated thus :

" The erosion of the distinction between jurisdictional errors and non-jurisdictional errors has, as we have seen, correspondingly eroded the distinction between void and voidable decisions. The courts have become increasingly

impatient with the distinction, to the extent that the situation today can be summarised as follows :

(1) All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent jurisdiction."

Similarly, Wade and Forsyth in Administrative Law, Seventh Edn.,1994, have stated the law thus at pp.341-342 :

"..... every unlawful administrative act, however invalid,is merely voidable. But this is no more than the truism that in most situations the only way to resist unlawful action is by recourse to the law."

And in the case of State of Rajasthan and others Vs. D.R.Laxmi and others, (1996) 6 SCC 445:

"10. The order or action, if ultravires the power, becomes void and it does not confer any right. But the action need not necessarily be set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances".

19 To this general proposition of law the Apex Court itself has carved out an exception, viz. in what circumstance limitation would not operate as a bar while exercising revisional powers. In case of State of Orissa and others Vs. Brundaban Sharma and Another, 1995 Supp.(3) SCC 249, it is stated thus in para 16 of the judgment :

"16. It is therefore, settled law that when the revisional power was conferred to effectuate a purpose, it is to be exercised in a reasonable manner which inheres the concept of its exercise

> within a reasonable time. Absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the purpose of the Act, or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower authorities or fraud or suppression. Length of time depends on the factual scenario in a given case. Take a case that patta was obtained fraudulently in collusion with the officers and it comes to the notice of the authorities after a long lapse of time. Does it lie in the mouth of the party to the fraud to plead limitation to get away with the order ? Does lapse of time an excuse to refrain from exercising the revisional power to unravel fraud and to set it right ? The answers would be no."

The Supreme Court thereafter goes on to observe in context of the facts before it that "a non est order is a void order and it confers no title and its validity can be questioned or invalidity be set up in any proceeding or at any stage". However, the Apex Court has also before making the aforesaid observation stated in earlier paras to the effect that : "Power under Section 211 of the Code must be exercised within reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order which is being revised." xxx xxx xxx "What would be a reasonable time so as to be immune from the attack that the power has been exercised in any reasonable manner would depend upon the facts and circumstances of the case".

20 Thus the settled position is : An order which is nullity has to be declared so by a competent court within the prescribed period of limitation; while exercising revisional power the law of limitation would normally apply; what would be a reasonable period of limitation would depend on facts and circumstances of each individual case; and, limitation would not be a bar in case of fraud or suppression of facts.

21 In the aforesaid circumstances, taking into consideration the ratio enunciated by the Supreme Court, it is apparent that in the present case even if the finding that the order dated 22/6/1971 passed by Mamlatdar & ALT was a nullity could be said to be a

correct finding, yet no explanation is forthcoming for filing appeal after a period of nearly 16 years. The position in law is well settled that just because an order is a nullity, it does not save limitation nor does it grant appellant leave to approach the Court/Appellate Authority beyond the prescribed period of limitation. Hence, on this ground also the orders of the appellate authorities viz. Deputy Collector and the Tribunal suffer from legal infirmity and are likely to be interfered with.

22 Mr.Patel is right when he contends that respondent nos. 2, 3 and 4 could not have exercised their right of appeal as they cannot be termed to be 'aggrieved' by the order of the Mamlatdar & ALT passed on 22/6/1971. They have been declared as permanent tenants and the purchase price has been fixed in accordance with the provisions of Section 32H(1)(i)(a) of the Act. In case the said respondents were treated as other tenants then under Section 32H(1)(ii)(a) of the Act, they would have been required to pay purchase price which would not be less than 20 times the assessment but not exceeding 200 times assessment as against the amount they have been called to pay as purchase price viz. six times the rent of the land. Therefore, so far as determination of purchase price is concerned no prejudice has been caused to respondent nos. 2, 3 and 4 which would entitle them to exercise their right of appeal. Similarly, Section 43 of the Act which deals with restriction of transfer of land purchased under the Act specifically prescribes that the tenant who has purchased the land or any interest under various sections mentioned in Section 43 of the Act is not entitled to sell or transfer or alienate in any manner except without previous sanction of the Collector and except without the consideration being fixed by the State Government. Section 32G of the Act does not find place in Section 43 of the Act and hence the land purchased under Section 32G of the Act is freely transferable. Therefore, even on this ground the respondent nos. 2, 3 and 4 cannot be said to be aggrieved which would grant them the right of appeal. It is apparent that both the appellate authorities viz. Deputy Collector and the Tribunal failed to take this aspect into consideration. It is settled law that the statutory right of appeal can be exercised only by an aggrieved party as stipulated.

23 In this connection what has been laid down by this Court in the case of Parshottam Ramaji Rathod Vs. Dhirajlal Dharamshi Mistry, 1999(3) G.L.R. 1079 :

"6. Reverting back to the facts of the case, there cannot be any controversy that the appeal filed by the petitioner before the Collector was in exercise of a statutory right of appeal. It is well settled principle that the right of appeal is a statutory right and is subject to all the restrictions imposed by the statute which confers that right. It is not an absolute right or an abstract right. The right of appeal is not merely a statutory right, but it is also a right to resort to a statutory procedure i.e., it is a procedural right and that therefore the same must comply with and must fall within the parameters laid down by the statute which governs the exercise of that right. If the statute conferring that right also imposes a period of limitation for the exercise of such a right, the appeal must be filed within the prescribed period. It goes without saying that if such right is sought to be exercised beyond the period of limitation it must be held that the right has been extinguished by lapse of limitation."

7 Learned Counsel for the petitioner seeks to overcome this hurdle by contending that where the subject-matter of challenge in the appeal viz., the entries in question are themselves void ab initio, the very concept of limitation cannot apply. This submission is fallacious for the simple reason that if the relevant entries in question were, in the opinion of the petitioners, null and void ab initio, it was open to the petitioners to ignore their existence, since according to the petitioners, they had no effect in law. It was also open to the petitioners, if their so-called rights were challenged in any proceedings before in any forum, to contend that their rights cannot be challenged on the basis of any entry which is in itself null and void ab initio. However, the petitioners have not adopted this course. What the petitioners have chosen to do is to approach the appropriate forum specifically for a declaration that the entries are null and void. The petitioners, therefore, have approached the forum for a specific declaration, sought on various grounds including the ground that such entries are null and void. However, it cannot be overlooked that the petitioners are seeking to exercise a statutory right of appeal for the purpose of obtaining such a declaration. Obviously, such a declaration

could not possibly be obtained by the petitioners except by exercising such statutory right. Once this statutory right is sought to be exercised, as explained hereinabove, such right must be exercised within the period of limitation.

It cannot, then be contended that although the right is sought to be exercised beyond the period of limitation, the concept of limitation becomes irrelevant merely because one of the grounds of challenge to the entries is that they are null and void.

7.1. What also cannot be overlooked is that in order to conclude that the entries are null and void or otherwise, the prescribed forum is required to apply its mind to the contentions raised, on the facts and circumstances of the case, and to record a finding thereon. Obviously, such application of mind and the recording of a finding thereafter cannot be achieved by the prescribed forum except by way of prescribed appeal. Thus, without there being a proper appeal i.e., unless the right of appeal is exercised within the period of limitation, the prescribed forum cannot possibly examine the matter on merits and/or to record the finding as prayed for by the petitioners. It also goes without saying that a series of decisions have laid down the principle that the expiration of the prescribed period of limitation extinguishes the procedural right to move the appropriate forum for the reliefs sought, and that the expiration of the period of limitation raise a jurisdictional barrier against that forum examining the case on merits. Thus, if the prescribed forum because of the lapse of limitation has no jurisdiction to examine the petitioner's contention on merits, it could not possibly first come to the conclusion that the entries were null and void and then hold that because the entries are null and void, the concept of limitation has no application at all."

(Emphasis supplied)

24 The last contention regarding non applicability of provisions of the Act to a land which is permitted to be converted into non agricultural land by a competent Court also merits acceptance in light of settled legal position enunciated by the aforesaid two decisions of this Court. It is apparent that once the land is declared to be non agricultural one on the basis of N.A.

Permission granted by the competent authority the said land loses its characteristic of agricultural land and would not be a 'land' within the meaning of Section 2(8) of the Act. If this be the position, the provisions of the Act would not apply to the land in question and the Deputy Collector could not have entertained the statutory power under the Act including entertaining of appeal under Section 74 of the Act.

25 In light of what is stated hereinbefore even if the petition is treated as a petition under Article 227 of the Constitution of India, as contended on behalf of the respondents, it is clear that appellate orders suffer from an error apparent on face of the record which would require this Court to assume jurisdiction. The Deputy Collector held that the order dated 22/6/1971 was a nullity and hence bar of limitation did not apply and entertained the appeal holding that the Mamlatdar & ALT had not complied with the provisions of Section 32G of the Act. This order was confirmed by the Tribunal and even the review application was rejected. As already demonstrated hereinbefore the order dated 22/6/1971 could not be treated as a nullity, and even if it is treated as nullity, the law of limitation would apply and in absence of any explanation the appellate authority could not have entertained the appeal. Similarly the nature of the land having undergone change, the appellate authority could not have exercised its jurisdiction and power under the provisions of the Act as the same stood divested by virtue of the fact that the provisions of the Act did not apply.

26 Hence, for all the aforestated reasons the impugned orders of the Tribunal viz. the orders dated 26/6/1992 and 17/4/1995 as well as the order of Deputy Collector dated 30/12/1987 are hereby quashed and set aside. Rule made absolute. There shall be no order as to costs.

Sd/-
(D.A.Mehta, J)

m.m.bhatt.